Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271

To: The Commission

COMMENTS OF CINGULAR WIRELESS LLC

CINGULAR WIRELESS LLC

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SUMMARY

At the outset, it is unclear whether the *NPRM* is intended to apply to *all* providers of broadband Internet access service or only to all cable and DSL providers of broadband Internet access service. The *NPRM* was issued as a part of the *Wireline Broadband Order*, which pointedly excluded wireless providers from its classification of broadband Internet access service as an information service.

Any consumer protection regulations that the Commission adopts for broadband Internet access should be minimally intrusive, given that Congress declared in Section 230 of the Communications Act that the Internet should be subject to the free market and "unfettered by Federal or State regulation." Any regulations adopted must be justified by market failure and based on a solid statutory source of authority. In this connection, the Commission's Title I ancillary authority is subject to significant limits. In particular, the regulations must be reasonably ancillary to the Commission's performance of its statutory responsibilities. Given Section 230's presumption *against* regulation of the Internet, there must be a specific statutory source of ancillary authority. No provision of the Act gives the FCC specific authority to regulate either broadband Internet access or information services, however, and thus Section 230 narrowly limits the use of ancillary authority in this area. Moreover, there is little need to impose regulatory requirements on broadband Internet access providers. Market forces are working, as Congress intended. There is no market failure, and no regulations are warranted; new regulatory requirements could disserve the public by decreasing competition.

Even if the Commission finds that regulations are necessary for some broadband Internet access providers, those regulations cannot be extended to CMRS providers. First, there is no policy basis for applying the proposed regulations to CMRS operators. CMRS is robustly competitive, both in voice service and data services, including broadband Internet access. The CMRS marketplace is already subject to rules tailored to this unique industry, and the market compels CMRS operators to respond to consumer needs. In fact, most of the issues posed by the *NPRM* have already been addressed with respect to CMRS providers. Moreover, the public interest would be disserved by applying new wireline-based consumer protection standards to CMRS operators' broadband Internet access services that may differ from the policies applicable to the other services customers get in the same bundle.

Second, there is a statutory reason for *not* applying generic broadband regulations to CMRS operators. Section 332 of the Act differentiates CMRS from other delivery technologies by both limiting state regulatory authority and requiring the Commission to forbear from unnecessary common carrier regulation. This statute is not a source of regulatory power, but is "limited to deregulation." As a result, the Commission cannot simply apply new regulatory requirements to CMRS as well as others in the interest of technology neutrality. A CMRS operator's broadband Internet access service is part of a CMRS service offering and cannot be subjected to levels of regulation that the Commission finds appropriate for other providers.

Finally, the Commission should preempt state regulation of broadband Internet access, which is jurisdictionally interstate. States have no inherent authority to regulate interstate service, and the Commission should make clear that any attempts by states to regulate broadband Internet access, regardless of the technology employed, are preempted. State regulation will severely affect the provision of Internet access across state lines.

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Cingular Wireless LLC hereby submits its comments in response to the Commission's *NPRM* concerning Consumer Protection in the Broadband Era.[1]

INTRODUCTION

The *NPRM* was included as part of the Commission's *Wireline Broadband Order*, which was principally focused on the classification of wireline telephone companies' DSL Internet access as an information service. Based on concerns raised in that proceeding and the earlier *Cable Modem* proceeding,[2] the Commission issued the *NPRM* to solicit comment on what, if any, regulatory measures should be pursued to protect consumers of broadband Internet access.

The *NPRM* appears not to be restricted to consumer protection measures for broadband service provided by wireline and cable companies, however. Instead, it seeks comment on the degree of regulation that should be applied, in the name of consumer protection, to "all providers

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[1] *Consumer Protection in the Broadband Era*, WC Docket 05-271, *Notice of Proposed Rulemaking* (*NPRM*), included in *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Dockets 02-33, 01-337, 95-20, 98-10, WC Dockets 02-242, 05-271, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150 (Sept. 23, 2005) (*Wireline Broadband Order*), *summarized*, 70 Fed. Reg. 60259 (Oct. 17, 2005).

[2] *High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (2002) (*Cable Modem Order*).

of broadband Internet access service, regardless of the underlying technology."[3] At the same time, the Commission appears not to have intended the scope of this proceeding to extend beyond DSL and cable providers, because the Commission specifically noted that it had not yet addressed the classification of broadband Internet access services provided by "wireless (satellite, mobile, or fixed wireless), or power line (electric grid) networks."[4]

Cingular is filing these comments because there is neither a reason nor a legal basis for applying such regulations to commercial mobile service ("CMRS") carriers' broadband Internet access offerings, in particular.

DISCUSSION

I. IF THE COMMISSION ADOPTS CONSUMER PROTECTION REGULATIONS FOR BROADBAND INTERNET ACCESS, THE RULES SHOULD BE MINIMALLY INTRUSIVE

In Section 230 of the Communications Act, Congress declared that the Internet should be, and remain, subject to "the vibrant and competitive free market, . . . unfettered by Federal or State regulation."[5] Accordingly, a light and cautious hand is therefore required in this proceeding. No more regulation should be applied than is clearly necessary due to market failure, and only when the Commission has a solid statutory basis for exercising its jurisdiction.

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3 *NPRM* at ¶ 146.

4 *Wireline Broadband Order* at ¶ 11 n.30. The footnote said that it would address the regulatory treatment of such technologies "in separate proceedings" and cross-referenced the *NPRM* with a "*see also*" citation, thereby suggesting that the *NPRM* was not intended to determine the regulatory treatment of broadband Internet access services offered by means of such technologies. Given footnote 30, the broadband Internet access services provided by CMRS and some other providers appear to be beyond the scope of the *NPRM*, in which case the rules adopted could not be applied to such providers. *See* 5 U.S.C. § 553. This is especially the case because the Commission's expressed rationale for exercising its Title I ancillary jurisdiction in the *NPRM* is predicated on its analysis of the applicability of Title I ancillary jurisdiction to DSL-based broadband Internet access. *See NPRM* at ¶ 146 & n.443 (referencing the ancillary jurisdiction discussion in the *Wireline Broadband Order*).

5 47 U.S.C. § 230(b)(2).

And consistent with the national policy of non-regulation of the Internet, the Commission should act to prevent undue regulation of the provision of broadband Internet access by states, which could be at least as devastating to the growth of a fully competitive market as excessive regulation by the Commission itself.

A. The Commission's Title I Ancillary Jurisdiction Provides Only a Limited Basis for Regulation Of Broadband Internet Access

The *NPRM* seeks to rely on the Commission's Title I ancillary jurisdiction in developing "a framework for consumer protection in the broadband age — a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology."[6] In exercising its Title I ancillary authority, however, the Commission is subject to significant limits. In setting aside the Commission's "broadcast flag" rule, the D.C. Circuit held last year that the Commission's "ancillary jurisdiction is limited to circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[7] The Court warned that "[g]reat caution is warranted here, because the disputed . . . regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing."[8] It could "find nothing in the statute, its legislative history, the applicable case law, or agency practice indicating that Congress meant to provide the sweeping authority the FCC now claims."[9]

A narrow construction of the Commission's ancillary authority concerning broadband Internet access is also compelled by Section 230 of the Act, which declares that it is "the policy

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6 *NPRM* at ¶ 146.

7 *American Library Association v. FCC,* 406 F.3d 689, 700 (D.C. Cir. 2005).

8 *Id.* at 702.

9 *Id.* at 704.

of the United States" that the Internet is not to be subjected to "Federal or State regulation" and is instead to remain subject to free market forces.[10] Accordingly, any exercise of Title I ancillary authority must be directly ancillary to a statutory grant of jurisdiction,[11] and that statutory basis for ancillary jurisdiction must be sufficiently specific to overcome the general policy of non-regulation of the Internet.

While Title II of the Communications Act grants the Commission specific authority to regulate interstate common carrier communications services, no provision of the Act purports to grant the Commission specific authority to regulate communications other than common carrier communications, or the use to which such communications are put, such as the provision of Internet access or information services that are provided via such communications.[12] Enhanced or information services have rarely been subjected to regulation, and then principally when they have been found to be incidental to a telecommunications service and therefore treated as a

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10 47 U.S.C. § 230(b)(2).

11 *See American Library Association,* 406 F.3d at 702.

12 Section 2(a) of the Act, 47 U.S.C. § 152(b), provides that the Act applies to all interstate communications, but it does not, by its terms, grant the FCC specific regulatory powers over all interstate communications. The FCC has used this as the fount of its "ancillary jurisdiction," and the U.S. Supreme Court held in *United States v. Southwest Cable Co.*, 392 U.S. 157, 172 (1968), that it "found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.'" That decision, of course, predated the enactment of Section 230, which expressly limits the FCC's jurisdiction over the Internet. Moreover, *Southwest Cable,* which the FCC relies upon for the broad reach of its ancillary authority, *see Wireless Broadband Order* at ¶ 109 & n.341, pointed out that the Commission's jurisdiction under Section 2(a) "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities" under other specific sections of the Act. 392 U.S. at 178. Accordingly, courts have held the Commission to lack jurisdiction over building construction issues that would unquestionably affect communications by preventing the construction of a tower, *see Illinois Citizens for Broadcasting, v. FCC,* 467 F.2d 1397, 1400 (7th Cir. 1972), and over contracts that affect the financial conditions of licensees, *see Regents v. Carroll,* 338 U.S. 586 (1950). Likewise, the D.C. Circuit has held that the FCC lacks jurisdiction under Section 2(a) to regulate the use to which communications are put after they have been received. *American Library Association,* 406 F.3d at 700-04.

telecommunications service instead of an information service.[13] Indeed, the Commission has never claimed to have any such specific statutory authority; it has relied only on its ancillary jurisdiction. In light of the limits on the Commission's ancillary jurisdiction discussed in *American Library Association* and the specific declaration by Congress that the Internet *not* be subject to federal regulation, the FCC cannot rest exclusively on its ancillary jurisdiction when it attempts to regulate broadband Internet access. And given that Internet access has been held to constitute an information service and *not* a telecommunications service each time the issue has been decided, the Commission's Title I authority over information services must be narrowly construed, given the lack of any express statutory authority over information services.

B. There Is Little or No Need for Imposing Specific Regulatory Requirements on Providers of Broadband Internet Access

Internet access has, to date, grown to its current state largely without any need for direct government regulation. Since the mid 1990s, consumer access to the Internet has evolved from almost exclusively dial-up to a mixture of dial-up, DSL, and cable modem, and as Internet access

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[13] *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act,* CC Docket 96-149, *First Report and Order and Further Notice of Proposed Rulemaking,* 11 F.C.C.R. 21905, 21958 (1996) ("services the Commission has classified as 'adjunct-to-basic' should be classified as telecommunications services, rather than information services"); *Beehive Telephone Co.,* 10 F.C.C.R. 10562, 10566 (1995) ("services that are incidental or adjunct to the common carrier transmission service are to be regulated in the same way as the common carrier service"), *aff'd on remand,* 12 F.C.C.R. 17930 (1997); *see also Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards,* CC Docket 91-115, *Report and Order and Request for Supplemental Comment,* 7 F.C.C.R. 3528, 3531 (1992) (validation and screening services subject to common carrier regulation because they are "incidental" to the provision of local exchange access service); *North American Telecommunications Association,* 101 F.C.C.2d 349, 359-361 (1985) (services that merely "facilitate the provision of basic services without altering their fundamental character" not treated as enhanced services), *recon.,* 3 F.C.C.R. 4385, 4386 (1988). The Commission has also, in the past, promulgated regulations concerning the conditions under which regulated telecommunications carriers may offer enhanced services, such as structural and nonstructural safeguards, but these did not *per se* regulate the enhanced services themselves.

increasingly becomes broadband and technology advances, new sources are emerging, including 3G CMRS, fixed wireless (*e.g.,* Wi-Max), and broadband over power line.

In short, market forces are working to make broadband Internet access more widely available, just as Congress hoped and intended. There is no market failure, which might justify regulation. Under these circumstances, the Commission should not impose regulations on broadband Internet access even if it has a statutory basis for doing so that overcomes the general policy of nonregulation declared by Congress.

To be certain, the Commission should take steps to remove regulatory obstacles to broader deployment or to new delivery technologies. It should tread carefully in imposing new requirements on providers, however. This is an increasingly competitive business. Prices to the consumer are rapidly decreasing, and the profit margin on generic broadband access is narrow. New regulatory requirements could work to the detriment of consumers if they impose costs or burdens on providers, because any costs will inevitably be passed through to consumers, and some providers may be driven from the market, decreasing competition.

Given the statutory policy of reliance on the free market instead of federal or state regulation where the Internet is concerned, the Commission's point of departure should be to avoid regulating and instead rely in the first instance on market forces and laws of general applicability to ensure that broadband Internet access services are furnished in a competitive and consumer-friendly manner. Only where there is a serious failure of market forces and a clear statutory basis for exercising jurisdiction should the Commission consider adopting regulations governing the provision of broadband Internet access, and any regulations that it adopts should be the minimum necessary.

II. CMRS BROADBAND INTERNET ACCESS SHOULD NOT BE SUBJECT TO THE PROPOSED REGULATIONS

Even if the Commission finds that consumer protection regulations are necessary for some providers of broadband Internet access service, it cannot extend any such regulations to CMRS broadband Internet access services. The Commission and Congress have both found that CMRS is not the same as other communications media. As a result, the fact that regulations may be found necessary in other contexts does not mean they are needed in the CMRS context — and they are not needed. Moreover, there are specific legal reasons why CMRS, in particular, may not be subjected to generic regulations of this nature.

A. There Is No Policy Basis for Imposing Regulations on CMRS Carriers' Provision of Broadband Internet Access

As discussed above, Congress has said that the Internet should remain subject to free market forces. CMRS is the "poster child" for a robustly competitive telecommunications market segment that has thrived under a free market. The Commission has repeatedly recognized the robustly competitive nature of the CMRS industry. In its most recent CMRS Competition Report, the Commission said:

> The continued rollout of differentiated pricing plans also indicates a competitive marketplace. In the mobile telephone sector, we observe independent pricing behavior, in the form of continued experimentation with varying pricing levels and structures, for varying service packages, with various handsets and policies on handset pricing. AT&T Wireless's Digital One Rate plan, introduced in May 1998, is one notable example of an independent pricing action that altered the market to the benefit of consumers. Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long-distance charges.[14]

[14] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial*
(footnote continued)

There is extensive competition and product differentiation among CMRS providers in their data and broadband service offerings, in addition to voice telephony:

> During the past year carriers continued to experiment with a mix of different methods for pricing such handset-based mobile data services, including pricing based on kilobytes consumed, a flat rate for each use or download of an application ("pay-as-you-go"), volume discounts on packages or bundles of an application, and unlimited use pricing. Use of these pricing options varies by type of application as well as by provider, with providers frequently offering customers a choice of pricing options for a particular application. In addition to allowing customers to purchase particular applications on a stand-alone or a la carte basis, carriers also offer bundled offerings that include various types and combinations of mobile data services. As in the past, mobile data pricing continues to be characterized by considerable complexity due to the diversity of pricing options.
>
> Communications data services such as text messaging, photo messaging, and other multimedia messaging services tend to be priced in similar ways. All the nationwide carriers allow customers to send and receive text messages on a pay-as-you-go basis for a flat rate per message sent or received, and in addition they typically offer customers the option of purchasing text messaging packages for a fee that affords customers a lower unit price per message as compared with the flat pay-as-you-go rate. Similarly, Cingular and T-Mobile offer photo messaging on both a pay-as-you-go basis and in discounted packages, albeit at higher rates per message as compared with text messaging. Other carriers also offer unlimited text messaging or photo messaging for a flat monthly fee. In addition to a la carte offerings, some carriers include various packages and combinations of text and multimedia messaging services as part of a bundled offering with a monthly mobile Internet access service plan and other mobile data services.[15]

The Commission has also noted that the use of different technologies within the CMRS sector has yielded product differentiation and enhanced competition.[16] As a result, there are a

(footnote continued)
Mobile Services, WT Docket 05-71, *Tenth Report*, 20 F.C.C.R. 15908, ¶ 97 (2005) (footnotes omitted).

15 *Id.* at ¶ 101 (footnotes omitted).

16 *Id.* at ¶ 107.

wide variety of advanced services and products offered on CMRS platforms, including multimedia messaging, music and video downloads, interactive games, and Internet browsing, in addition to garden-variety telephony, email, and text messaging. Many of these services and products rely on broadband Internet access provided via 3G CMRS platforms.[17]

This robust CMRS marketplace is bounded by a series of consumer protection rules that have effectively advanced the public interest while not hindering innovation. In each of the areas identified in the *NPRM,* the CMRS industry already operates subject to distinct regulations adapted by the Commission to the unique characteristics of the mobile marketplace. Moreover, CMRS carriers, as participants in a competitive market, are compelled by market forces to respond to consumer needs. The consumer protections afforded by CMRS carriers address many of the concerns expressed in the *NPRM*:

- ***CPNI.*** CMRS carriers are subject to CPNI regulations pertaining to their telecommunications services. They also protect customers' private information, whether that information pertains to telecommunications services or information services, through both contracts and privacy policies. Thus, the *NPRM*'s concerns about CPNI-like information related to consumers' information services are already addressed, and there is no need for common carrier-like regulation. As a practical matter, many CMRS carriers contract with outside parties for the provision of the content accessible through their advanced services platforms, such as music, video, and ringtones; in Cingular's case, information concerning customers' content selections is not made available to outside parties for marketing purposes. Cingular, in particular, does not make available to outside parties *any* information concerning its customers' use of Cingular services, regardless of the nature of those services, without the customer's affirmative consent, unless required by law.

- ***Slamming.*** The FCC has concluded that slamming does not occur in the CMRS marketplace and thus has declined to apply those rules to CMRS providers' telecommunications services. Moreover, the Commission's analogous concerns about switching of providers of broadband access are not applicable to CMRS,[18] because the broadband access is a tightly

17 *See generally id.* at ¶¶ 139-144.

18 *See NPRM* at ¶¶ 150-51.

integrated part of a service package, just as CMRS providers offer local and long-distance as an integrated package.

- ***Truth-in-Billing.*** CMRS carriers are subject to their own set of truth in billing rules, which differ from those applicable to other telecommunications providers because the FCC recognized significant differences between the types of carriers. The CMRS rules are the subject of an existing further notice of proposed rulemaking,[19] the outcome of which may be different from, and inconsistent with the generic rules under consideration in the *NPRM*.[20] Cingular has advocated that the CMRS-specific truth-in-billing policies should apply to all services included on a carrier's bill.[21]

- ***Network Outage Reporting.*** CMRS carriers are already subject to the network outage reporting requirements cited in the *NPRM*[22] for their telecommunications services. Given that CMRS telecommunications services and broadband Internet access are provided over the same platform, there is no independent reason for subjecting broadband Internet access services to similar rules.

- ***Discontinuance of Service.*** The Commission has already made the reasoned determination that there is no need to subject CMRS carriers to the Section 214 discontinuance of service rules cited in the *NPRM*,[23] and there is no reason why their broadband Internet access service should be subject to such rules.

- ***Rate averaging.*** The Commission has previously assessed the appropriate regulatory regime for CMRS rate averaging, and there is no reason to revisit it here with respect to broadband Internet access. In fact, CMRS carriers typically have uniform rates both statewide and nationally for their services, including broadband Internet access service, rendering moot the concerns about rate averaging expressed in the *NPRM*.[24]

In addition to these mandatory requirements, the competitive nature of the wireless marketplace also has motivated the wireless carriers to adopt additional measures designed to

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19 *See Truth-in-Billing and Billing Format*, CC Docket 98-170, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 6448, 6459 (2005).

20 *See NPRM* at ¶¶ 152-53.

21 *See* Cingular Comments, CC Docket 98-170, at 11-12, 18, 23 (filed June 24, 2005).

22 *See NPRM* at ¶ 154; 47 C.F.R. § 63.100(a)-(e).

23 *See NPRM* at ¶ 155; 47 U.S.C. § 214; 47 C.F.R. § 63.71.

24 *See NPRM* at ¶ 156.

improve the customer experience. CMRS carriers have been increasingly responsive to consumer concerns and have instituted consumer protections going beyond those required by the Commission. For example, the industry has implemented the CTIA Consumer Code,[25] and many carriers have entered into "Assurance of Voluntary Compliance" agreements with states to provide additional consumer protections.[26]

In short, there is no need to extend the Commission's wireline consumer protection policies to wireless broadband Internet access. Moreover, the Commission must take care not to stifle the innovation that has flourished in CMRS in response to consumer needs by broadly applying wireline-based regulatory solutions to wireless operations. In the end, consumers will be best served by fully competitive provision of broadband Internet access governed by market forces. Indeed, undue regulation may discourage the provision of broadband Internet access from alternative sources such as CMRS, resulting in fewer choices for consumers, less innovation, and ultimately, perhaps, a need for more extensive regulation.

Moreover, the public interest would be disserved by applying wireline-based consumer protection standards to CMRS carriers' broadband Internet access services and thereby requiring different standards to apply to two parts of an integrated service offering. CMRS customers are likely to subscribe to service bundles that include voice telephony, a variety of content and other services, and Internet access. If the subscriber has broadband-capable CPE, then some or all of these services may be provided over the carrier's broadband CMRS platform when it is available, and at other times may be provided over a lower-bandwidth platform. There is no reason to subject different parts of a customer's experience to rules that vary by what RF technology is being used at any given point, nor is there any reason to vary the rules depending

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25 *See id.* at ¶ 147.

26 *See* <http://www.NASUCA.org/AVC%20Documents.htm>.

on the nature of the service or content being accessed. When the customer uses the web browser in his or her phone, the customer does not somehow become in need of different protection when the service is being provided over a broadband 3G platform than when a lower-bandwidth platform is employed.

Moreover, the public interest does not warrant imposing regulations on CMRS provision of services that may involve broadband Internet access, given that such services are only now emerging and could be stifled by undue regulation. Technological alternatives to DSL and cable modem service should not reflexively be subject to the full panoply of FCC regulation, given that they are new, competing platforms whose competitive potential is not yet fully known. The public interest would clearly be served by placing as few regulatory restrictions as possible on the provision of broadband Internet access service via wireless technology.

B. There Is No Legal Basis for Imposing Regulations on CMRS Carriers' Provision of Broadband Internet Access

At the outset, the Commission's rationale for using its ancillary authority to impose regulations on "all" broadband Internet access providers does not pass muster with respect to CMRS providers. There is no statutory justification for adopting consumer protection regulations governing CMRS providers' broadband Internet access offerings. Indeed, there is a statutory basis for *not* applying regulations to CMRS providers that are applicable elsewhere. Section 332 of the Communications Act significantly differentiates CMRS from other delivery technologies, by both limiting state regulatory authority[27] and requiring the Commission to

[27] 47 U.S.C. § 332(c)(3)(A).

forbear from unnecessary common carrier regulation.[28] Moreover, in considering whether to subject CMRS providers to regulation or to forbear, the statute requires the Commission to

> consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest."[29]

In evaluating the broadband Internet access services provided by CMRS providers, the Commission must recognize the unique nature of CMRS, which has long involved the joint provision of telecommunications and information services. In 1999, the Commission acknowledged this as a basis for differentiating the regulation of CMRS from wireline services:

> In the wireless context, our regulation of CMRS providers and the history of the industry has allowed the development of bundles of CPE and information services with the underlying telecommunications service. Thus, information services and CPE offered in connection with CMRS are directly associated and developed together with the service itself. Indeed, we are persuaded by the record and our observations of the development of the CMRS market generally that the information services and CPE associated with CMRS are reasonably understood by customers as within the existing service relationship with the CMRS provider. Customers expect to have CPE and information services marketed to them along with their CMRS service by their CMRS provider.[30]

Therefore, existing FCC consumer protection measures that have long been applied to CMRS telecommunications services are sufficient even when the services go beyond mere

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[28] 47 U.S.C. § 332(c)(1)(A).

[29] 47 U.S.C. § 332(a)(1)(C).

[30] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information,* CC Docket 96-115*, Order on Reconsideration and Petitions for Forbearance,* 14 F.C.C.R. 14409, ¶ 42 (1999) (footnotes omitted).

telecommunications service. There is no indication that there is any problem to be solved. As a result, there is no basis for adopting a new regulation.

The Commission has long recognized that under Section 332, certain services are deemed "CMRS" even though they are otherwise considered "enhanced services" or "information services."[31] As such the Commission has consistently and effectively relied on its CMRS regulatory regime to provide consumer protection for consumers of all services offered over the CMRS platform. There is no basis for abandoning this approach. As a result, regulatory requirements that are generally applicable to broadband Internet access cannot simply be applied to CMRS broadband offerings.

Moreover, Section 332 cannot be used as a source of ancillary authority for regulation of CMRS carriers' provision of broadband Internet access. Section 332 does not grant the Commission authority to *regulate*, but instead is "limited to *deregulation* of commercial mobile services."[32] In particular, Section 332 requires the Commission to limit the application to CMRS

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[31] *See, e.g., Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* CC Docket 94-54 *et al., Memorandum Opinion and Order on Reconsideration,* 14 F.C.C.R. 16340, ¶ 27 (1999) (discussing "CMRS enhanced services"); *Flexible Service Offerings in the Commercial Mobile Radio Services,* WT Docket 96-6, *Second Report and Order and Order on Reconsideration,* 15 F.C.C.R. 14680, ¶ 7 (2000) (discussing CMRS provision of a variety of data and information services); *Geotek Communications,* 15 F.C.C.R. 790, ¶ 27 (2000) (discussing information services integrated with voice service); *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report,* 13 F.C.C.R. 19746, 19808 (1998) (discussing CMRS as including both telephony and "non-telephony" services that constitute information services).

[32] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services,* WT Docket 98-100, *Memorandum Opinion and Order and Notice of Proposed Rulemaking,* 13 F.C.C.R. 16857, 16913 (1998) (emphasis added).

providers of certain types of regulation that otherwise apply to common carriers generally[33] and to determine whether such regulation will enhance competition among CMRS carriers.[34]

Thus, the Commission cannot simply apply new regulatory requiresments regarding broadband Internet access to CMRS providers in the interest of technology neutrality. And given that Congress specifically limited the application of common carrier regulation to CMRS providers, the Commission must take particular care to the extent it imposes common carrier-like regulation on CMRS providers' broadband Internet access services. Indeed, to the extent the Commission adopts common carrier-like regulations for broadband Internet access services generally, it must consider whether exempting CMRS from such regulations is warranted under the standards in Section 332.

Although the Commission has not yet conducted a proceeding to determine the classification of particular CMRS service offerings[35] — and such a proceeding would likely be very complex given the rapidly evolving nature of CMRS service offerings — many services offered by CMRS providers are clearly closer to the statutory definition of information service than that of telecommunications service. Broadband Internet access service is clearly one of these. At the same time, all services offered over a CMRS platform, whether they are

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33 *See* 47 U.S.C. § 332(c)(1)(A). *See also Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services,* GN Docket 93-252, *Second Report and Order,* 9 F.C.C.R. 1411, 1418 (1994) ("While the statute ensures that all CMRS providers will be subject to certain key requirements of Title II, Congress has given the Commission authority to forbear from applying other Title II provisions if such regulation is not needed to prevent unreasonably discriminatory rates or practices, or to protect consumers, and if such forbearance is consistent with the public interest (*e.g.*, the Commission action, by augmenting competition, promotes better services for consumers at reasonable prices). By taking these steps, Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.")

34 *See* 47 U.S.C. § 332(c)(1)(C).

35 *See Wireline Broadband Order* at ¶ 11 n.30.

telecommunications services or information services, are CMRS and may be subject to only limited regulation.

III. THE COMMISSION CLEARLY HAS AUTHORITY TO, AND SHOULD, EXEMPT BROADBAND INTERNET ACCESS SERVICES FROM STATE REGULATION

The *NPRM* inquires about harmonization of state and federal regulation of broadband Internet access.[36] The Commission can and should exempt particular offerings, such as broadband Internet access, which are interstate in nature, from state regulation.

The Commission's authority to determine whether a particular offering is an information service is a consequence of its need to distinguish such services, which are not subject to common carrier regulation, from telecommunications services, which are. Drawing such distinctions, as the Commission has done in the *Cable Modem* and *Wireline Broadband Order*, is simply a matter of reasonably interpreting the Communications Act's definition of the terms, which is well within the Commission's authority.[37] Likewise, the Commission clearly has authority to make a determination that a particular information service, or class of services, is interstate in nature, as a matter of interpreting and applying the definitions in the Communications Act.

While the Commission has not yet made classification decisions regarding specific CMRS service offerings,[38] its rulings in the *Cable Modem* and *Wireline Broadband Order* provide significant guidance as to how many offerings should be classified. In any event, it may be immaterial whether some services are information services or telecommunications services

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36 *NPRM* at ¶ 158.

37 *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005); *id.* at 2712-13 (concurring opinion of Breyer, J.).

38 *See Wireline Broadband Order* at ¶ 11 n.30.

for purposes of determining whether state regulation of such services is appropriate, given their interstate nature.[39] This is especially true of broadband Internet access service.

Once the Commission has made a determination that a particular service is wholly or partly interstate, state authority to regulate such a service is inherently limited. First, Section 2(b) of the Act, 47 U.S.C. § 152(b), limits state regulatory authority to services that are intrastate. To the extent a service is jurisdictionally mixed, states may be preempted from regulating that service if the intrastate and interstate components cannot readily be separated to permit state regulation of only the intrastate component.[40] Second, the Commission has authority to preempt state regulation that would conflict with legitimate federal objectives.[41] And, finally, state regulation that would significantly impinge on interstate commerce may contravene the commerce clause of the Constitution.[42]

The Commission has long held that Internet access is, in general, an information service,[43] but more importantly it has held it to be inherently interstate in nature.[44] As a result, states have no inherent authority to regulate broadband Internet access in particular. The Commission, therefore, should make clear that any attempts by states to regulate the provision of broadband Internet access, regardless of the technology employed, are preempted.

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39 *See generally Vonage Holdings Corp.,* 19 F.C.C.R. 22404 (2005), *pet. for review pending sub nom. Minnesota Public Service Commission v. FCC,* No. 05-1069 (8th Cir.).

40 *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986).

41 *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *see also Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation,* 7 F.C.C.R. 1619 (1992) (preempting a state freeze on telephone company provision of voice mail service on the ground that the freeze conflicted with federal objectives concerning enhanced service).

42 U.S. Const. art. 1, § 8, cl. 3; *see Vonage,* 19 F.C.C.R. at 22427-30.

43 *See Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Report to Congress,* 13 F.C.C.R. 11,501, 11,531 (1998) (*Universal Service Report*).

44 *GTE Telephone Operating Cos.*, 13 F.C.C.R. 22466, ¶ 1 (1998), *recon.*, 17 F.C.C.R. 27409 (1999); *see generally Vonage Holdings Corp., supra*.

This preemption should extend to all forms of regulation that are specific to Internet access or Internet access providers, even if such laws or regulations purport to be consumer protection measures. States cannot be permitted to regulate Internet access, because state-by-state regulation will severely affect the integrated provision of Internet access across state lines. Companies such as Cingular do not provide broadband Internet access on a state-by-state basis; such service is offered, where facilities permit, in accordance with national-network-wide standards on an integrated basis.

To the extent states have laws or regulations of general applicability — *i.e.*, not specifically applicable to Internet access or broadband service — to govern contracts and provide consumer protection, there is no need for such laws or regulations to be preempted. In fact, such laws hold all companies doing business in a given state to the same standards and thereby safeguard consumers in an appropriate manner.

CONCLUSION

The Commission's authority to regulate broadband Internet access in general is subject to specific limitation in Section 230 of the Act, which declares the policy of the United States to be *non*-regulation of the Internet. This inherently limits the Commission's ability to regulate such service pursuant to its ancillary authority. And to the extent the Commission nevertheless finds it necessary and appropriate to regulate broadband Internet access as a general matter, it cannot routinely include CMRS providers' broadband Internet access under such regulations in light of Section 332 and the absence of any need for such regulation in the CMRS context. CMRS broadband Internet access is subject to two separate Congressional directives to rely on market forces: Section 332 and Section 230. "Consumer protection" regulation pursuant to the Commission's ancillary authority cannot, and should not, extend to broadband Internet access

offered by CMRS providers. At the same time, state regulation of such service, which is inherently interstate in nature, cannot be permitted.

Respectfully submitted,

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